Supreme Court, U.S.
FILED
99 7 26 OCT 25 1999
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No.

In the
Supreme Court of the United States

GLORIA CAUDILLO,

Petitioner,

v.

CONTINENTAL BANK/BANK OF AMERICA ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether this Court should establish a uniform, definitive rule with specific elements for when an employer will be liable for a discriminatory environment that is otherwise actionable in accord with *Faragher v. City of Boca Raton*.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Gloria Caudillo, respectfully requests that a writ of certiorari be issued to review the judgment and opinion of the Untied States Court of Appeals for the Seventh Circuit entered into this proceeding on July 26, 1999.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in *Caudillo v. Continental Bank/ Bank of America Illinois,* (98-3032, July 26, 1999) is not reported, but can be found at 1998 U.S. Dist. LEXIS 11022. (Appendix A)

The opinion of the district court in Caudillo *v. Continental Bank/Bank of America Illinois,* No. 97 C 884, is not reported but can be found at 1999 U.S. App. LEXIS 17915 (N.D. Ill. July 16, 1998). (Appendix B)

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit ("Court of Appeals") was entered on July 26, 1999.

CONSTITUTIONAL PROVISION

The Civil Rights Act of 1964, Title VII, 42 U.S.C. §2000e-2(a)(1)(2) appear in Appendix C.

STATEMENT OF THE CASE

The Petitioner, a 53 year old woman from Chicago, was employed at Continental Bank (also located in Chicago) since 1980. After being initially hired as a word processor at the Bank, Petitioner was later promoted to Senior Correspondence Specialist in January of 1982. In 1987, Petitioner was transferred from the commercial banking support services department to the printing and graphics department as a word processor operator. Four years later, in 1991, Petitioner was again promoted, this time as a "PC word processing specialist." Her duties at that time involved performing graphic design functions such as preparation of name tags, place cards, table tents, labels and buttons, Bank bulletin lay outs, bank ads, internal correspondence, charts, company presentation covers; nearly everything in the bank's use of what could be described as a graphic design division or department. Petitioner was trained and received certificates in graphic design software, including computer programs such as the commercially popular programs known as Freelance, Ventura, PageMaker, and Coreldraw. Training in these programs was completed during the time period covering 1989 through 1993.

In early 1993, the Bank moved the Graphics Services employees to another facility at 200 West Jackson Street in Downtown Chicago ("Jackson facility"). The manager of the Graphic Services Division there was Mr. William Gillespie ("Gillespie"); there was also a "unit manager," Mr. Ronald Neff, ("Neff"); and an Art Director at this facility, Ms. Sabrina Mazer ("Mazer"). There were approximately fifteen Graphic Service Operators at the Jackson facility department, which worked closely with

the Bank's Publishing Center located at 231 South LaSalle Street ("LaSalle Building"), the main office for the bank. The Publishing Center provides electronic imaging, proposal construction, laminating, duplicating, collated binding, document preparation for flyers, brochures, newsletters, memo pads and the like, for the Bank. About 30% to 40% of the Publishing Center's work comes from Graphic Services. The Publishing Center employs approximately twelve operators and two work coordinators, Mr. Chester Wrice and Mr. Charles Mabry ("Mabry"). From 1993 onward, Petitioner received her assignments from a "team leader," Ms. Renette Pleasant ("Pleasant"), who in turn reported to Mazer. The chain of command then went from Mazer to Neff to Gillespie. For example, after an operator completes a project she takes it to the Publishing Center for final processing. Petitioner and all the other operators had to follow up with the Publishing Center to make sure that the work was completed correctly and on a timely basis.

The sexual harassment Petitioner claims victim to encompasses a three-year period. Beginning in the summer of 1991, Petitioner alleges that Mabry asked her out on a date. Petitioner refused, and actionable sexual harassment by Mabry followed until her termination in 1995. Petitioner asserts that Mabry first came over to her cubicle and stared at her in a sexual manner, creating a hostile work environment. At least three other instances of Mabry approaching the Petitioner's cubicle and staring at her in this fashion followed from 1991 to 1995. Petitioner also alleges that she was stalked by Mabry in the workplace, who also made sexually connotative comments in front of co-workers and supervisors. In

one incident, Petitioner alleges that in April of 1994, Petitioner stepped into an empty elevator when she saw Mabry standing at the door of the elevator, staring at her in a "threatening and intimidating manner." There were also allegations of actual physical harassment. Petitioner states that on numerous occasions, Mabry approached Petitioner from behind, touching her hair, arms and body; then without saying a word, would walk away. In January of 1992, Petitioner alleges that while bending down to place files in a cabinet, someone called Petitioner's name. Turning around to see who had called her, she saw Mabry standing directly behind her. Mabry then took a flash photograph of the Petitioner. After being confronted by Petitioner, Mabry responded that he was "joking" and further stated that there was no film in the camera. About three weeks later, however, Petitioner was approached by Mabry at Petitioner's cubicle wherein Mabry presented a photograph of Petitioner bending over. Petitioner immediately took said photograph from Mabry and told Mabry to leave her alone. In another alleged incident, Petitioner states that she was standing at a counter when Mabry again came up behind her and touched her hair and shoulder. Then Mabry, according to Petitioner, later approached her from behind again and rubbed his body against hers. In yet another physical encounter, Petitioner claims that in April of 1993, Mabry grabbed Petitioner's arm and fondled one of her breasts. In what now became a shockingly familiar pattern, Mabry allegedly approached Petitioner while she was at her cubicle, stared at her for a number of minutes, then left. There were also allegations of sexual harassment against Petitioner by Mabry in public. In June of 1993, Petitioner was at a festival in front of the

LaSalle bank location, when according to Petitioner, she suddenly felt an arm placed on her shoulders and a hand move down and touch one of her breasts. Not surprisingly, Petitioner claims this assault was done by Mabry as well. In another public incident, this one on the Bank's premises in October of 1993, Petitioner states Mabry approached her cubicle and stated loudly, in front of other co-workers, that "Gloria and I went out." That same month, Petitioner walked into to the Bank's video room, where Mabry and Gillespie were present. Mabry then allegedly said in front of Petitioner, "Whenever Gloria goes to Publishing Center she lets you know don't fuck with me." Part of this incident allegedly occurred in the presence of co-workers. The next month, in November of 1993, Petitioner was at her desk and in the presence of Pleasant, Mabry said loudly, "Gloria why don't you get married." About a month later, after Petitioner asked Mabry to stop the harassment, Petitioner was standing at her desk when suddenly she felt the penis of a man rubbing against her buttocks. According to Petitioner, she turned around and saw Mabry. Once again, Mabry stared at her and left. Petitioner claims that the culminating effect of all these incidents has left her humiliated and permanently injured as a result of this alleged torment. The harassment continued and on February 25, 1994. Petitioner again asked Mabry to leave her alone. According to Petitioner, Mabry became angry and said loudly that she was negligent and did not perform her work properly. In response, Petitioner reported Mabry's behavior to Gillespie who acted by simply informing Petitioner that Mabry was just trying to "intimidate" her. Now that Gillespie had been informed of Mabry's alleged conduct, in approx-

imately April of that year, Petitioner walked into a room with Gillespie and Mabry said to her "did you get lucky." This remark to Petitioner was also made in the presence of co-workers Cheryl Conway and Andrew Prangley.

According to Petitioner, the working environment became so hostile and intimidating that she decided to report Mabry's sexual harassment to her supervisor, Neff on March 28, 1994. Petitioner told Neff that she had been continually sexually harassed by Mabry. Petitioner informed Neff that the harassment included constant unwanted remarks, stalking, pervasive sexual stares, physical touching of her body, fondling one of her breasts, and Mabry rubbing the front of his lower body against her buttocks. Petitioner also advised Neff that she had spoken to Mabry at least two times previous and asked him to leave her alone. Neff informed Petitioner that he would discuss these allegations with Hayes, the assistant manager and supervisor of Mabry. On March 29, 1994 after Petitioner met with Hayes and Neff, Hayes informed Petitioner that he would restrict Mabry from approaching her cubicle. About a week later, on April 4, 1994, Neff then met with Gillespie and Petitioner, who said the he (Neff) would also temporarily prohibit Mabry from approaching Petitioner's cubicle.

Management took no other action. As such, Petitioner subsequently contacted Doris Walters ("Walters"), a human resources representative at the Bank. On two separate occasions, first on April 8, 1994 then on April 18, 1994, Petitioner informed Walters of Mabry's alleged sexual harassment and that other incidents also had been reported to Neff, Hayes and Gillespie. Petitioner informed Walters of both workplace incidents and the

alleged stalking incidents occurring outside the workplace on April 15, 1994, after their meeting. During a third meeting on April 27, 1994, Petitioner also told Walters that Mabry had violated Gillespie's restrictions and that she believed nothing was ever said to Mabry concerning her reports of sexual harassment. After no other action was taken by her employer, Petitioner began to document her victimization:

> —On June 14, 1994 a letter complaining of sexual harassment was given to Linda Stephenson of the Bank's human resources department;
>
> —In September of 1994, another letter complaining of sexual harassment was given to Linda Stephenson;
>
> —On November 18, 1994 a letter to Linda Impastato complaining of sexual harassment was sent by Petitioner;
>
> —On January 29, 1995 another letter complaining of sexual harassment was sent to Linda Impastato;
>
> —On February 10, 1995 a third letter was sent by Petitioner to Linda Impastato, again complaining of sexual harassment; and
>
> —On March 25, 1995 a letter written by Petitioner was given to Neff, again complaining of incidents of sexual harassment against her by Mabry.

When Stephenson did confront Mabry with Petitioner's allegations of sexual harassment, Mabry denied them all. Stephenson did, however, instruct Mabry to avoid Petitioner. Petitioner was then transferred to another position. On September 14, 1994, Petitioner expressed to Impastato her interest in the position of loan account representative or administrative assistant. Walters advised Petitioner that the loan account position was

closed but she could however, be transferred to the same building as Mabry as an administrative assistant. Petitioner refused this offer and applied for a position as senior secretary. Petitioner was told on December 13, 1994, however, that the position was closed. Petitioner then was offered to return to the job that she had started in 1980 as a word processor; a demotion that she refused.

On September 9, 1994 Impastato told Petitioner that she could move her desk into Pleasant's cubicle, an employer who worked closely with Mabry. She suggested placement near another co-worker, far away from Mabry. Instead, she was placed in a cubicle far away from everyone, in the last cubicle in the department, thus isolated from every co-worker in the office.

From 1980 until complaints of sexual harassment were made to management, Petitioner's work performance evaluations were all above average or average. In 1986 and 1987, her appraisals stated that she was "able to grasp and solve most situations with little or no assistance" and that she was a very good team worker. In 1988 she was transferred to the graphics and publishing services department and her appraisal documented "average performance." In 1991 Petitioner was promoted to a PC Specialist and received a merit increase and a promotion increase in salary. She was later given a difficult company assignment and received a commendation letter for her performance concerning that assignment. From 1991 to 1994, Petitioner's appraisals, signed off by Neff and Gillespie, were all average or above average. In the 1994 appraisal she received an "exceptional average" rating, documenting that "Gloria is currently best suited in her current position," recommending a salary increase.

No complaints were ever received about her performance during this time period. In fact, Petitioner received commendation letters from customers from 1994 through 1995. Appraisals continued to support an average or above job performance during this time as well, noting that Petitioner's strengths were in part that she did not shy away from complicated designs and produced time-sensitive complex charts. To keep track of employee work performance, the Bank had in place certain policies and practices regarding the appraisal process for its employees. There is no question that Petitioner's 1994 appraisal, signed by Mazer who was not her supervisor, was not in accord with the company's written policy, all of which is documented, in the lower court proceedings. On August 28, 1995 Petitioner was discharged. Petitioner subsequently complained to Bank human resources of retaliation, the first in April of 1994. Then she filed EEOC charges against the Bank on June 14, 1994. In her first derogatory performance report signed by Mazer after complaining of Mabry sexual harassment to human resources, Petitioner's next appraisal accused her of lack of organization, poor communication, and lack of ability, all of which were in stark contrast to her appraisals she received the previous thirteen years at the Bank.

After receiving a right to sue letter, Petitioner filed a complaint in federal district court against the Bank on February 7, 1997 stating that the Bank was liable for sexual harassment committed by Mabry and also claiming that the Bank had fired her in retaliation for bringing claims of sexual harassment by Mabry.

The district court then dismissed in its entirety, the Petitioner's complaint after the Bank filed a motion for

summary judgment, ruling that there was no genuine issue of material fact to go further with the case.

On appeal, the Seventh Circuit Court of Appeals, despite making a passing reference to this Court's decision in *Faragher v. City of Boca Raton,* affirmed the district court's decision despite stating that:

> [W]e pause to note our strong disapproval of the type of workplace behavior allegedly exhibited by Mabry and our grave reservations about the Bank's suggestions that Mabry's conduct did not constitute actionable harassment . . . .

Nevertheless, the Seventh Circuit, despite acknowledging sexual harassment in the workplace or at a minimum refuting the Bank's suggestion that Mabry did not harass Petitioner, found that the Bank "fulfilled its duty with respect to remedial actions" and therefore affirmed the district court's decision. The Seventh Circuit relied, in part, on the rationale that the Bank did whatever they could have done to relieve it of any liability:

> [W]e note that the Bank's actions did prove effective; Mabry stopped touching and making sexual comments to Ms. Caudillo. When Ms. Caudillo complained that Mabry was still bothering her by looking at her in a sexual and threatening manner, the Bank took further steps to alleviate her discomfort. The Bank reassigned Ms. Caudillo to a cubicle that would minimize her contact with Mabry and also arranged to have a manager escort him whenever he needed to see her for business purposes. These efforts, we conclude, were reasonably calculated under the circumstances to prevent any further harassment.

In ruling that the bank's total response was reasonable, the Court of Appeals merely noted that management

"also warned Mabry that any further questionable behavior would result in employment consequences" and in fact gave "Ms. Caudillo a two-week paid vacation and offered to let her transfer to another position if she thought it would help." In the same breath as saying it would have difficulty believing the Bank that Mabry's conduct was not actionable sexual harassment, it nevertheless concluded the Bank did no wrong. It simply christened the Bank's acknowledgment that sexual harassment was taking place, holding that the remedial measures doctrine, apparently by its mere invocation, serves as an absolute bar to employer liability.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW DEMONSTRATES THAT LOWER COURTS ARE NOT ABLE TO FOLLOW *FARAGHER* DESPITE ACKNOWLEDGING SEXUAL HARASSMENT TAKING PLACE IN THE WORK PLACE. THIS COURT SHOULD SET FORTH WHAT REMEDIAL MEASURES SHOULD BE TAKEN BY EMPLOYERS SO THAT *FARAGHER* CAN BE FOLLOWED AND NOT BE PAID A HOLLOW HOMAGE.

The prohibition of an individual from maintaining a Title VII sexual harassment action against an employer because employers across the nation can now use this Court's recent decision is *Faragher* as a shield rather that a sword for the sexually harassed employee is inconsistent with the remedial purpose of the Civil Rights Act of 1964. Lower courts need a specific definition of what are remedial measures in order to follow *Faragher v. City of Boca Raton*.

A. Employers Misapply, And Lower Courts Allow, The Remedial Measures Doctrine In Title VII Cases Using It As A Shield Rather Than A Sword.

There is presently a conflict among the United States Circuit Courts as to what constitutes remedial measures taken by employers to provide a defense to liability from employees who are unquestionably sexually harassed in the workplace. There are cases in the lower courts being summarily dismissed where acknowledgment of sexual harassment is taking place, yet lower courts feel their hands are tied and must simply follow a test absent any rule or guidelines constituting what makes up remedial measures. The rights of employees who suffer sexual harassment in the workplace now find employers cloaked in an undefined, remedial measures defense which lower courts rely on in disposing of actions where there is no question that sexual harassment occurred. This was not this Court's intention when deciding *Faragher.* Title VII has long been recognized as a "remedial statute with a broad sweep." *Pullman-Standard v. Swint,* 456 U.S. 275, 276, 102 S.Ct. 1781, 72 L.Ed.2d 64 (1982). This Court previously stated that the Congressional objective of Title VII is to achieve equality of employment opportunities. *Griggs v. Duke Power Co.,* 401 U.S. 424, 429-31, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). "Where federally protected rights have been invaded, it has been the rule from the beginning that Courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell v. Hood,* 327 U.S. 678, 674, 66 S.Ct. 773, 90 L.Ed. 939 (1946).

B. The Petition Should Be Granted Because The Opinion Below Conflicts With This Court's Prior Rulings in *Faragher v. City of Boca Raton* And Prevents Proper Implementation of This Court's Opinion In Other Circuits.

Prior to Petitioner's case, the Seventh Circuit liberally construed Title VII "in keeping with its remedial purpose." *Verpinsky v. Fluor Daniel, Inc.*, 87 F.3d 881, 889 (7th Cir. 1996), (*citing Doe v. St. Joseph's Hospital of Fort Wayne*, 788 F.2d 411 (7th Cir. 1986), as evidence of its generous construction in title VII actions.). The Seventh Circuit previously followed certain general paths in determining whether an employer had responded adequately to an employee's complaint of sexual harassment by a co-worker established in *McKenzie v. Illinois Dep't of Transportation*, 92 F.3d, 473 (7th Cir. 1996), stating that:

> If an employer takes reasonable steps to discover and rectify the harassment of its employees, however, it has discharged its legal *duty*. *Bakerville v. Culligan Int'l Co.*, 50 F.3d 428, 431 (7th Cir. 1995). 'An employer's response to alleged instances of employee harassment must be reasonably calculated to prevent further instances of employee harassment under the particular facts and circumstances of the case at the time the allegations are made.' *Brooms*, 881 F.2d at 421. We are not to focus 'solely upon whether the remedial activity ultimately succeeded, but instead should determine whether the employer's total response was reasonable under the circumstances as then existed.' *Id*. The reasonableness of an employer's response depends, in part, on the gravity of the harassment alleged. *Bakerville*, 50 F.3d at 432.

As this Court recently has already noted in *Faragher*:

> Courts of Appeals have struggled to derive manageable standards to govern employer liability for hostile environment perpetrated by supervisory employees. While following our admonition to find guidance in the common law of agency, as embodied in the Restatement, the Courts of Appeals have adopted different approaches. Compare, e.g., *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (CAIO 1997), cert. pending, No. 97-232; III F.3d 1530 (CAII 1997) (case below); *Gary v. Long*, 313 U.S. App. D.C. 403, 59 F.3d 1391 (CADC), cert. denied, 516 U.S. 1011, 133 L.Ed. 2d 493 (1995); and *Karibian v. Colombia University*, 14 F. 3d 773 (CA2), cert. denied, 512 U.S. 1213, 129 L.Ed.2d 824, 114 S.Ct. 2693 (1994), We granted certiorari to address the divergence, 522 U.S. (1997), and now reverse the judgment of the Eleventh Circuit and remand for entry of judgment in Faragher's favor.

It is evident that Courts of Appeals, despite acknowledging actionable conduct on the part of supervisory employees, are nevertheless affirming dismissals of district court cases, like Petitioner's case, because the employer simply asserts that it was aware of sexual harassment complaints. In recognition that lower courts are left to carve out there own standard, this court has noted that "our cases have established few definite rules for determining when an employer will be liable for a discriminatory environment that is otherwise actionably abusive." *Faragher* at 27. This Court has further eluded to addressing this issue in acknowledging that "[g]iven the circumstances of many of the litigated cases, including some that have come to us, it is not surprising that in many of them, the issue has been joined over the suffi-

ciency of the abusive conditions, not the standards for determining an employer's liability for them." *Id.* at 789. It is time for this Court to clarify some of the exact steps an employer should take prior to successfully asserting the common law remedial measures defense thus avoiding liability. Lower courts have not taken this Court's prior admonishments in defining what exactly are reasonable remedial measures.

II.

LOWER COURTS SHOULD FOLLOW SPECIFIC COMMON LAW PRINCIPLES ALREADY ELUDED TO, BUT NOT ESTABLISHED, BY THIS COURT FOR DETERMINING WHETHER AN EMPLOYER TOOK REASONABLE REMEDIAL MEASURES IN RESPONSE TO ACTIONABLE SEXUAL HARASSMENT.

When examining common law agency principles as applied to Title VII sexual harassment cases, the employer should first and foremost have in place the following:

> *A proven, effective mechanism for reporting and resolving complaints of sexual harassment, available without undue risk or expense to the employee complaining of sexual harassment, subject to proof by the employer by a preponderance of evidence.*

This is a new, more effective standard which should be adopted by this Court. The employer should demonstrate that it has utilized this mechanism previously or in cases of first time complaints of sexual harassment in the workplace, it should be well known. A standard should be in place: *The employer must demonstrate that the mechanism used is widely known, accepted and has been proven*

successful in the workplace. So called mechanisms like offers to transfer the employee to a demoted position, transferring the employee into the same office building as the alleged harasser, or relocating the employee into an isolated area, away from co-workers would not be acceptable as valid defenses to taking "remedial measures." Thus the employer could not escape liability simply by documenting the alleged sexual harassment, or writing letters to the employee-victim acknowledging the same and soliciting offers to resolve the problem. This also was done in Petitioner's case. It now apparently has relieved the employer from any actionable conduct by a supervisory employee (acknowledged by the Court of Appeals) simply because the employer documented the harassment and took superficial actions to insulate it from liability. Neither Congress nor this Court intended Title VII and *Faragher* to do that.

When looking at the facts of the case and the remedial measure that should have been undertaken, in the same light as this Court has said "Poor Joshua" so too should this court say, "Poor Gloria." There will be many other Glorias, as various Courts of Appeals continue to allow the employer simply to document the alleged sexual harassment, offering hollow remedial measures such as writing letters to the employee-victim with no expectation of proven success or definitive guidelines to follow. Such gross harassment, like that suffered by the Petitioner, will go unchecked and most likely will continue to get worse. Millions of employees will be detrimentally affected by the absence of an established rule setting forth what measures are reasonable and acceptable. This Court has previously stated that "[i]t is by now well

recognized that hostile environment sexual harassment by supervisors (and, for that matter, coemployees) is a persistent problem in the workplace." *Id.* at 798 *citing Lindemann & Kadue* 4-5 (discussing studies showing prevalence of sexual harassment). The Seventh Circuit's failure to address these issues departs from this Court's previous decision in *Faragher;* it is violative of Title VII and this Court's path for dealing with an employer's response to sexual harassment in the workplace. As such, it warrants review from this Court.

CONCLUSION

For the reasons contained herein, it is respectfully submitted that a Writ of Certiorari should issue to review the judgment and opinion of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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October 25, 1999

APPENDIX A

GLORIA CAUDILLO, Plaintiff-Appellant,
v. CONTINENTAL BANK/BANK OF AMERICA ILLINOIS, Defendant-Appellee.

No. 98-3032

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

1999 U.S. App. LEXIS 17915

March 30, 1999, Argued
July 26, 1999, Decided

NOTICE: [*1] RULES OF THE SEVENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 97 C 884. Robert W. Gettleman, Judge.

DISPOSITION: AFFIRMED.

COUNSEL: For GLORIA CAUDILLO, Plaintiff - Appellant: Yolanda Haces, FLADER & HACES, Chicago, IL USA.

For CONTINENTAL BANK/BANK OF AMERICA ILLINOIS, Defendant - Appellee: Kim A. Leffert, James W. Gladden, Jr., MAYER, BROWN & PLATT, Chicago, IL USA.

JUDGES: Before Hon. KENNETH F. RIPPLE, Circuit Judge, Hon. DIANE P. WOOD, Circuit Judge, Hon. TERENCE T. EVANS, Circuit Judge.

OPINION: ORDER

Gloria Caudillo brought this action against her employer, Continental Bank ("the Bank"). She alleged that the Bank was liable for sexual harassment committed by one of her co-workers and that the Bank terminated her employment in retaliation for her pursuit of the sexual harassment charge. The plaintiff appeals the district court's grant of summary judgment for the defendant. For the reasons that follow, we affirm the judgment of the district court.

I

FACTUAL BACKGROUND

Gloria Caudillo began working for the Bank as a word processor in 1980. In 1991, she was promoted to the position of desktop operator in the Bank's Graphics Services Department. Employees in Graphics Services work closely with employees in Publishing Services. Ms. Caudillo's sexual harassment claim centers on a series of incidents involving a co-worker in Publishing Services, Charles Mabry.

According to Ms. Caudillo, the following interactions took place between her and Mabry. In the summer of 1991, Mabry asked Ms. Caudillo out on a date, but she refused. Thereafter, Mabry would visit Ms. Caudillo's cubicle and stare at her in a sexually suggestive manner.

In November 1992, as Ms. Caudillo was bending down to look for a file, Mabry called her name and took her picture as she turned around. In January 1993, Mabry came up behind Ms. Caudillo in the Publishing Center and touched her hair and shoulder. Although she told him not to touch her, he did not respond. Soon thereafter, Mabry brushed the side of his body against Ms. Caudillo's side as she was standing at a counter. In April 1993, Mabry came up behind Ms. Caudillo and grabbed her arm; as he moved his hand down, he brushed her [*3] breast. In June 1993, at a festival on the street in front of the Bank, Mabry placed his arm around Ms. Caudillo's shoulder and moved his hand down, touching her breast. On February 3, 1994, while Ms. Caudillo was standing at her desk, Mabry came up behind her, touched her hair, and rubbed the front of his body against the back of her body.

In addition to the incidents of staring and touching, Mabry also made comments that made Ms. Caudillo uncomfortable. In October 1993, while staring at Ms. Caudillo in a suggestive manner, Mabry told a co-worker in a loud voice that he and Ms. Caudillo had gone out. Ms. Caudillo responded that they had not gone out and never would. In November 1993, Mabry asked Ms. Caudillo loudly in front of co-workers, "Why don't you get married?" Ms. Caudillo was embarrassed because the subject of the question was personal.

On March 28, 1994, Ms. Caudillo at last complained of Mabry's behavior to Ronald Neff, the Unit Manager of Graphics Services, and said she wanted it to stop. Neff told her that he would discuss the matter with Gary Hayes, the Unit Manager of Publishing Services. The

next day, Neff and Hayes met with Ms. Caudillo; they told her that they would [*4] restrict Mabry's contact with her and that they would discuss the matter with William Gillespie, the Division Manager of both Graphics Services and Publishing Services.

The Bank, which has a written policy on sexual harassment, provides employees with three channels for the reporting of sexual harassment: employees can report harassment to their supervisors, to a human resources representative, or through the "Person-to-Person" hotline. Ms. Caudillo made her complaints known to Gillespie on April 4, 1994. Soon thereafter, Ms. Caudillo also met multiple times with Doris Walters in human resources and with Linda Stephenson, the manager responsible for handling "Person-to-Person" sexual harassment complaints. The Bank conducted an investigation. Mabry denied the allegations, and the Bank was unable to find corroborating evidence of either party's story.

Nevertheless, the Bank took several steps to address Ms. Caudillo's concerns. Stephenson sent a written memo to Mabry, reminding him of the Bank's prohibition of sexual harassment, instructing him to avoid contact with Ms. Caudillo, and instructing him to receive coaching to make him more aware of his non-verbal demeanor. The memo also [*5] made clear that any further questionable behavior involving Ms. Caudillo or any other female employee "could seriously affect his employment with the Bank." R.13, Tab 19. Stephenson also gave Ms. Caudillo a two-week paid vacation and offered her a transfer to a different position.

Ms. Caudillo admits that Mabry did not touch her again or speak to her inappropriately after the Bank took

the aforementioned remedial actions. However, she claims that he continued to make her uncomfortable by the way he looked at her. On April 21, 1994, when Ms. Caudillo entered an elevator, she turned around to find Mabry standing outside the door looking at her in a threatening manner.

In November 1994, the Bank sent Ms. Caudillo a written memo documenting its continued actions in response to her further complaints. The memo indicated that Mabry was instructed to avoid any non-work-related contact with Ms. Caudillo, not to speak to Ms. Caudillo unless required by his work duties, and to stay out of the building where Ms. Caudillo worked except as required by his work. The memo encouraged Ms. Caudillo to inform human resources if Mabry failed to comply with any of these restrictions. The Bank also responded [*6] to Ms. Caudillo's concern that a new seating arrangement within Graphics Services might increase her contact with Mabry; Ms. Caudillo was reassigned a cubicle away from the co-workers who had frequent contact with Mabry, and Neff arranged for a manager to escort Mabry for any necessary business contact between him and Ms. Caudillo.

On March 15, 1995, almost a year after Ms. Caudillo first complained, the Bank sent Ms. Caudillo a memo reviewing the status of her sexual harassment charge. The memo summarized all of the Bank's actions in response to her complaint and stated that the Bank would continue to respond to any further issues that might arise.

On August 28, 1995, almost a year and a half after Ms. Caudillo brought the sexual harassment charge, her

employment was terminated for poor performance. The plaintiff disputes that her performance was inadequate and claims that her discharge was in retaliation for bringing the sexual harassment charge. According to the Bank, although Ms. Caudillo received average or above average performance ratings for most of her tenure at the Bank, her performance deteriorated in 1994 and 1995.

In June 1995, after several instances of substandard [*7] performance by Ms. Caudillo and numerous complaints from co-workers about her uncooperative attitude,[1] Bank management determined that her performance had deteriorated to an unsatisfactory level and that she should be informed that she needed to show improvement within the next 30 days. Art Director Sabrina Mazer Ladue drafted a review, and Gillespie

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[1] The record contains numerous examples of Ms. Caudillo's substandard performance in 1994 and 1995. For example, in May 1994, Ms. Caudillo had difficulty completing an assignment to design and assemble 50 buttons. Her decisions regarding design and construction caused delay, increased costs, and required part of her work to be re-done by another employee. In January 1995, Ms. Caudillo was assigned to transfer a logo from a pin onto a program cover. Although a co-worker instructed her on the procedure for scanning the logo, she was unable to follow the instructions. The co-worker had to redo the work, and the project was completed late. In May 1995, Ms. Caudillo was assigned to create name tags, place cards, and table cards for 350 people, whose names were provided on a computer disk. Ms. Caudillo had difficulty using the computer file and instead inputted the names herself. Her progress was slow, which required her to work overtime and to enlist two other employees to help her meet the deadline. The client later complained that many names inputted by Ms. Caudillo had been misspelled. The record contains additional examples of Ms. Caudillo's failure to follow specific instructions successfully and to complete projects independently.

approved it. On June 30, 1995, Ms. Caudillo was given a copy of the review and, though she was invited to do so, she refused to meet with Mazer to discuss it.

The Bank continued to note instances of Ms. Caudillo's unsatisfactory performance throughout the summer of 1995.[2] On August 21, 1995, Mazer, with Gillespie's approval, recommended to human resources representative Linda Stephenson that Ms. Caudillo be terminated for poor performance. Stephenson concurred with Mazer's recommendation, and Ms. Caudillo's employment was terminated on August 28, 1995.

II

HOLDING OF THE DISTRICT COURT

The district court granted summary judgment for the Bank on both claims. The court first held that the Bank was not liable for sexual harassment because it had discharged its legal duty to take remedial measures in response to Ms. Caudillo's complaints. The court emphasized that the steps taken by the Bank were reasonably calculated to stop the harassment and that, indeed,

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[2] For example, in July 1995, Ms. Caudillo prepared a cover for a client but omitted the "crop" marks that inform the printer how to trim the page. Her oversight caused delay and increased the cost of producing the cover. In August, Ms. Caudillo was responsible for sending some important documents to Herman Dodson in the Bank's New York office. However, she misaddressed the Federal Express envelope so that the documents were never received, causing three employees to have to redo the work while Dodson delayed his meeting until the documents arrived. The record also reflects that Ms. Caudillo's uncooperative attitude did not improve over this period.

Mabry did not touch Ms. Caudillo or make any further sexual comments after she complained to Bank management in March 1994.

On the retaliation claim, the court held that Ms. Caudillo had failed to establish a prima facie case of retaliation because she had not shown a causal connection between her sexual harassment complaint in March 1994 and her discharge in August 1995. Although Ms. Caudillo argued that the timing of the two events was suspicious, the court found that the year-and-a-half gap was too large to give rise to an inference of retaliation. Moreover, the court held, even if Ms. Caudillo had made a prima facie case, her claim still must fail; the Bank had presented enough evidence of poor performance to shift the burden to the plaintiff to show pretext, but Ms. [*10] Caudillo had presented no evidence of pretext other than her own assertion that her performance was adequate. Because Ms. Caudillo had not shown that the Bank did not honestly believe that poor performance was the reason for her discharge, the district court granted summary judgment for the Bank on the retaliation claim.

III

DISCUSSION

A. Sexual Harassment

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national" 42 U.S.C. § 2000e-2(a)(1). This prohibition in-

cludes sexual harassment that is sufficiently "severe or pervasive" to "alter the conditions of [the victim's] employment and create an abusive working environment." Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275, 2283, 141 L. Ed. 2d 662 (1998) (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986)) (internal quotation marks omitted). Ms. Caudillo claims that Mabry's behavior toward her created a hostile work environment [*11] for which the Bank should be held liable under Title VII. The parties do not dispute that Mabry was Ms. Caudillo's co-worker, rather than her supervisor. We therefore apply the standard for employer liability for harassment by co-workers. See Parkins v. Civil Constructors of Illinois, Inc., 163 F.3d 1027, 1032 (7th Cir. 1998). An employer is liable for co-worker harassment if the plaintiff can show that the employer "failed to take reasonable steps to discover and remedy the harassment." Wilson v. Chrysler Corp., 172 F.3d 500, 508 (7th Cir. 1999); see also Shepherd v. Slater Steels Corp., 168 F.3d 998, 1004 (7th Cir. 1999) (stating that an employer is liable under a hostile environment theory if the plaintiff can establish that the employer "knew or had reason to know about the harassment and failed to take appropriate remedial measures"). "An employer's legal duty in co-employee harassment cases will be discharged if it takes 'reasonable steps to discover and rectify acts of sexual harassment of its employees.'" *Parkins*, 163 F.3d at 1032 (quoting *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 432 (7th Cir. 1995)); [*12] *McKenzie v. Illinois Dep't of Transp.*, 92 F.3d 473, 480 (7th Cir. 1996) ("When an employee is harassed by a co-worker, the employer may be held responsible only if 'the employer knew or should have

known about an employee's acts of harassment and fails to take appropriate remedial action.'" (quoting *Brooms v. Regal Tube Co.*, 881 F.2d 412, 421 (7th Cir. 1989))).

The district court did not address the question whether Mabry's conduct was so severe or pervasive as to constitute actionable harassment. Assuming that it was, the court based its summary judgment ruling on its conclusion that the Bank had satisfied its legal duty to take steps that are reasonably calculated to prevent further harassment. Because the Bank clearly fulfilled its duty with respect to remedial actions, we affirm the district court's decision on that ground. However, we pause to note our strong disapproval of the type of workplace behavior allegedly exhibited by Mabry and our grave reservations about the Bank's suggestion that Mabry's conduct did not constitute actionable harassment.

In McKenzie, we articulated the considerations that must guide a court in determining whether [*13] an employer has responded adequately to an employee's complaint of sexual harassment by a co-worker: If an employer takes reasonable steps to discover and rectify the harassment of its employees, however, it has discharged its legal duty. *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 431 (7th Cir. 1995). "An employer's response to alleged instances of employee harassment must be reasonably calculated to prevent further harassment under the particular facts and circumstances of the case at the time the allegations are made." Brooms, 881 F.2d at 421. We are not to focus "solely upon whether the remedial activity ultimately succeeded, but instead should determine whether the employer's total response was reasonable under the circumstances as then existed." Id. The reason-

ableness of an employer's response depends, in part, on the gravity of the harassment alleged. Baskerville, 50 F.3d at 432. McKenzie, 92 F.3d at 480.

In the case before us, the Bank acted promptly in response to Ms. Caudillo's complaint in March 1994. As soon as they were made aware of the situation, Neff and Hayes took action to [*14] restrict Mabry's contact with Ms. Caudillo.[3] Even though the Bank's investigation did not yield corroborating evidence of sexual harassment, the Bank took numerous steps to address the concerns of a distressed employee. Stephenson instructed Mabry in writing to avoid contact with Ms. Caudillo and to receive coaching on his nonverbal behavior. She also warned Mabry that any further questionable behavior would result in employment consequences. Stephenson gave Ms. Caudillo a two-week paid vacation and offered to let her transfer to another position if she thought it would help.

Although our inquiry should not focus on whether the remedial measures were ultimately successful, see id., we note that the Bank's actions did prove effective; Mabry stopped touching [*15] and making sexual comments to Ms. Caudillo. When Ms. Caudillo complained that Mabry was still bothering her by looking at her in a sexual and threatening manner, the Bank took further steps to alleviate her discomfort. The Bank reassigned Ms. Caudillo to a cubicle that would minimize her contact with Mabry

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[3] Mabry was instructed to avoid any non-work-related contact with Ms. Caudillo, not to speak to Ms. Caudillo unless necessitated by his job, and to limit his time spent in the building where Ms. Caudillo worked to that required to perform his work duties.

and also arranged to have a manager escort him whenever he needed to see her for business purposes. These efforts, we conclude, were reasonably calculated under the circumstances to prevent any further harassment. We therefore affirm the district court's grant of summary judgment to the defendant on the sexual harassment claim.

B. Retaliation

Title VII forbids an employer to "discriminate against any individual . . . because he has made a charge . . . or participated in any manner in an investigation, proceeding, or hearing under" Title VII. 42 U.S.C. § 2000e-3(a). To establish a prima facie case of retaliation under Title VII, a plaintiff must demonstrate that "(1) she engaged in statutorily protected expression; (2) she suffered an adverse action; and (3) there is a causal link between the protected expression and the adverse action." *Eiland v. Trinity Hosp.*, 150 F.3d 747, 753 (7th Cir. 1998). In the case before us, the district court held that the plaintiff failed to establish the third element—a causal link between her sexual harassment complaint in March 1994 and her termination in August 1995. The plaintiff presents no direct evidence of causation between the two events, instead arguing that the timing raises an inference of causation. The plaintiff argues that the Bank acted methodically for 15 months to effectuate her discharge in retaliation for the sexual harassment charge. However, the lapse of time between the plaintiff's sexual harassment complaint and her discharge is simply too long to raise an inference of retaliation. See *Hughes v. Derwinski*, 967 F.2d 1168, 1174 (7th Cir. 1992) (holding

that a four-month gap is too large to create inference of retaliation); *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 321 (7th Cir. 1992) (holding that the timing of the sexual harassment complaint, standing alone, did not create a genuine issue as to causation between the complaint and the discharge six months later); *Maldonado v. Metra*, 743 F. Supp. 563, 568 (N.D. Ill. 1990) (holding that a five-month lapse is not temporally close enough to raise an inference of causal link).

Even if the plaintiff could establish a prima facie case, she still could not prevail on her retaliation claim. The record contains ample evidence of her substandard performance in the year preceding her discharge. This evidence is sufficient to shift the burden to the plaintiff to demonstrate pretext under the McDonnell-Douglas burden-shifting framework. The plaintiff has presented no evidence of pretext other than her own assertions that her performance was adequate.[4] However, these self-interested assertions cannot raise a genuine issue regarding pretext. *See Williams v. Williams Elecs., Inc.*, 856 F.2d 920, 924 (7th Cir. 1988); *see also Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464-65 (7th Cir. 1986), cert. denied, 479 U.S. 1066, 93 L. Ed. 2d 1002, 107 S. Ct. 954 (1987). She has not presented any evidence that the Bank lied about its proffered reason for firing her. See *Abioye v. Sundstrand Corp.*, 164 F.3d 364, 368 (7th Cir. 1998) ("In demonstrating pretext, a plaintiff must show

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[4] Notably, unlike the plaintiff in the Juarez case, Ms. Caudillo makes no argument that her performance may have deteriorated as a result of the alleged sexual harassment. See Juarez, 957 F.2d at 321 n.3. Rather, she insists that her performance was at all times satisfactory.

more than that the employer's decision was incorrect; the plaintiff must also show the employer lied about its proffered explanation."), cert. denied, 119 S. Ct. 2337, 144 L. Ed. 2d 235, 1999 WL 184116 (U.S. 1999). Ms. Caudillo suggests that pretext is indicated by the Bank's failure to follow its own procedures for dealing with employees who are performing inadequately, including delaying her salary increase and giving her an "out-of-cycle" appraisal. However, the record indicates that these procedures are discretionary, not mandatory. Thus, the Bank's decision not to utilize these procedures does nothing to discredit the Bank's proffered reason for the plaintiff's termination—poor performance. In sum, Ms. Caudillo has not presented evidence sufficient to support a finding of pretext, and therefore her claim cannot survive summary judgment.

For the foregoing reasons, the judgment of the district court is affirmed.

APPENDIX B

GLORIA CAUDILLO, Plaintiff, v. CONTINENTAL BANK / BANK OF AMERICA ILLINOIS, Defendant.

No. 97 C 884

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1998 U.S. Dist. LEXIS 11022

July 15, 1998, Decided

MEMORANDUM OPINION AND ORDER

Plaintiff Gloria Caudillo has filed a two-count complaint against defendant Continental Bank / Bank of America Illinois ("the Bank"), alleging sexual harassment (Count I) and retaliation (Count II) in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. at 2000e et seq. The following motions are presently before the court: (1) the Bank's motion for summary judgment on all counts; and (2) the Bank's motion to strike several affidavits presented by plaintiff. For the reasons set forth below, the motion for summary judgment and the motion to strike are granted.

FACTS

The following facts are undisputed except where otherwise noted.[1] Plaintiff is a former employee of the Bank. On October 1, 1980, the Bank hired plaintiff as a word processor/typist. On March 1, 1991, plaintiff was promoted and became a PC Word Processing Specialist, a desktop operator position in Graphics Services. From approximately 1993 forward, plaintiff was part of a work group of several operators in Graphics Services, all of whom received their assignments from a team leader, Renette Pleasant. ("Pleasant"). Pleasant reported to Sabrina Mazer Ladue ("Mazer"), the Art Director. Mazer reported to Ronald Neff ("Neff"), the Unit Manager, and Neff reported to William Gillespie ("Gillespie"), the Division Manager of Publishing and Graphics Services.

Employees in Graphics Services work closely with employees in Publishing Services, also known as the Publishing Center. As of 1993, approximately twelve operators, two work coordinators, a Production Manager,

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[1] Several times in her response to the Bank's Local Rule 12 statement of uncontested material facts, plaintiff fails to support her denials by specifically referring to an affidavit, deposition, or other part of the record as required by Rule 12. Accordingly, where supported by the record, certain statements by the Bank have been deemed admitted pursuant to Rule 12. See Knox v. McGinnis, 998 F.2d 1405, 1408 n.8 (7th Cir. 1993). Both the Bank, in its statement of uncontested material facts, and plaintiff, in her statement of additional uncontested material facts, similarly fail to support certain assertions with references to the record. The court has, therefore, disregarded these assertions. Finally, the Bank failed to respond to plaintiff's statement of additional uncontested material facts. The court directs the parties to read Local Rule 12 and follow it in the future.

and a Unit Manager worked in the Publishing Center. Charles Mabry ("Mabry") was one of the two work co-ordinators. The Unit Manager of Publishing Services, Gary Hayes ("Hayes"), like Neff, the Unit Manager of Graphics Services, reported to Gillespie. Therefore, although Mabry was a work coordinator, not an operator, he was not one of plaintiff's supervisors; Mabry and plaintiff were merely co-workers.

According to plaintiff's testimony, the following events between Mabry and herself occurred. In the summer of 1991, Mabry asked plaintiff out on a date, but she refused. Thereafter, Mabry began coming to plaintiff's cubicle, where he would stare at her and look her "up and down" in a sexual manner. In November 1992, while plaintiff was bending down to look for a file, Mabry called her name and took her picture as she turned around. In January 1993, while plaintiff was dropping off a project in the Publishing Center, Mabry came up behind her and touched her hair and shoulder. Plaintiff [*4] told him not to touch her, but Mabry did not respond. In April 1993, Mabry came up behind plaintiff, grabbed her arm, moved his hand down, and brushed her breast with his fingers. In June 1993, Mabry came up behind plaintiff, placed his arm around her shoulder, and moved his hand down her breast. On February 3, 1994, plaintiff was standing at her desk looking at some work. Mabry came up behind her, touched her hair, and brushed the front part of his body against the back of her body. Plaintiff has testified that she could feel his penis on her buttocks. Throughout this period, Mabry continued to stare at plaintiff in what she has characterized as a "suggestive sexual" manner. In October 1993, in front of plaintiff, Mabry told a co-

worker that he and plaintiff had gone out. Plaintiff responded by telling Mabry that they had not gone out and never would. On another occasion in October, Mabry stated in a loud voice in front of various co-workers, "Whenever Gloria goes to the Publishing Center she lets you know, don't fuck with me."[2] In November 1993, in front of several co-workers, Mabry asked plaintiff, "Why don't you get married?" Plaintiff claims that Mabry's conduct constituted [*5] sexual harassment and resulted in a hostile work environment.

Plaintiff did not complain about Mabry's conduct to any of her supervisors until March 28, 1994. On that date, plaintiff told Neff that Mabry had been sexually harassing and intimidating her, and that she wanted his behavior to stop. Neff told plaintiff that he would discuss the matter with Hayes and get back to her. On March 29, 1994, Hayes and Neff met with plaintiff and told her that they were going to restrict Mabry's contact with plaintiff and that they would discuss the matter with Gillespie when he returned from a vacation. On April 4, 1994, plaintiff met with Gillespie and repeated her concerns. Throughout April 1994, plaintiff also complained about Mabry's conduct to Doris Walters ("Walters"), a member of the human resources department. The parties dispute whether plaintiff told the Bank officials about all of the incidents of alleged [*6] harassment, and whether she described the incidents in detail. Basically, plaintiff claims that she told them everything. Neff, Hayes, Gillespie, Walters, and others, however, have all testified that

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[2] Although it is ultimately of no consequence, the court does not consider this comment to be sexual in nature.

plaintiff never told them that Mabry ever touched her breast. Rather, they have all testified that they did not understand plaintiff to be claiming that Mabry had ever touched her in a sexual way.

The Bank—which has had a published policy against harassment and a hotline for reporting harassment since at least 1992—investigated plaintiff's allegations. Mabry denied touching plaintiff, asking her on a date, or looking at her in a sexual manner. Nevertheless, he was instructed by the Bank to avoid any contact with plaintiff that was not work-related, not to speak to plaintiff unless required by his job responsibilities, and to limit the amount of time he spent at work to that required to complete his job responsibilities. Mabry was warned in writing that any questionable behavior concerning plaintiff or any other female employee could seriously affect his employment at the Bank. Mabry was also required to receive special coaching regarding his non-verbal demeanor. Plaintiff was allowed [*7] to take two weeks vacation with pay, and told that she could transfer to another position for which she was qualified if she desired.

Plaintiff continued to complain that Mabry was still harassing and intimidating her. She asserts that Mabry followed her on various occasions and stared at her. She does not, however, assert that he made any sexual comments to her after she complained in March 1994. She also admitted at her deposition that Mabry never touched her after March 1994. Eventually, Mabry was required to have a member of management escort him whenever he ever needed to conduct business with Plaintiff in person.

The parties dispute the quality of plaintiff's work performance. Defendants claim that her work performance deteriorated in 1994 and 1995, and that she was eventually terminated for poor performance on August 28, 1995. Plaintiff claims that her performance was adequate, and that the Bank employees retaliated against her for complaining about Mabry's conduct. Plaintiff filed a charge of discrimination with the EEOC on June 14, 1994. Plaintiff filed an amended charge on June 18, 1995, and a second amended charge on September 19, 1995, adding allegations of retaliation in each charge.

DISCUSSION

I. SUMMARY JUDGMENT STANDARDS

A movant is entitled to summary judgment under Rule 56 when the moving papers and affidavits show there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Unterreiner v. Volkswagen of Am., Inc., 8 F.3d 1206, 1209 (7th Cir. 1993). Once a moving party has met its burden, the nonmoving party must go beyond the pleadings and set forth specific facts showing there is a genuine issue for trial. See Fed. R. Civ. P. 56(e); Becker v. Tenenbaum-Hill Assoc., Inc., 914 F.2d 107, 110 (7th Cir. 1990). The court considers the record as a whole and draws all reasonable inferences in the light most favorable to the party opposing the motion. See Fisher v. Transco Services-Milwaukee, Inc., 979 F.2d 1239, 1242 (7th Cir. 1992).

A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. [*9] Ct. 2505 (1986); see also Stewart v. McGinnis, 5 F.3d 1031, 1033 (7th Cir. 1993). This standard is applied with added rigor in employment discrimination cases, where issues of intent and credibility often dominate. See Sarsha v. Sears, Roebuck & Co., 3 F.3d 1035, 1038 (7th Cir. 1993). However, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." Anderson, 477 U.S. at 252.

II. SEXUAL HARASSMENT

Title VII makes it "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Title VII's prohibition against discrimination is not limited to economic or tangible discrimination. See Harris v. Forklift Sys. Inc., 510 U.S. 17, 21, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993). Rather, it extends to "'discriminatory intimidation, ridicule, and insult'" in the workplace that is "'sufficiently severe or pervasive to alter the

conditions of the victim's employment and create an abusive working environment.'" Id. (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65, 67, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986)). The standard for a hostile work environment claim under Title VII is both objective and subjective. See 510 U.S. at 21-22. Based on the totality of the circumstances, plaintiff must demonstrate that the alleged discriminatory conduct created an environment that a reasonable person would find hostile or abusive and that the victim actually perceived as abusive. See id.

In Count I, plaintiff claims that Mabry's conduct created a hostile work environment. The Bank argues that plaintiff cannot succeed on her hostile work environment claim for several reasons. In Illinois, a plaintiff must file an EEOC charge within 300 days of the alleged harassment. See Speer v. Rand McNally & Co., 123 [*11] F.3d 658, 662 (7th Cir. 1997). Plaintiff filed her EEOC charge on June 14, 1994. Thus, the Bank first argues that plaintiff cannot base her claim on the incidents that took place prior to August 14, 1993, and that the incidents that took place after that date do not amount to actionable harassment as a matter of law. In response, plaintiff argues that she has asserted a continuing violation.

Under the continuing violation doctrine, a plaintiff may get relief for a time-barred act by linking it with an act that occurred within the limitation period. See id. at 663. The courts then treat the combination of acts as one continuous act that ends within the limitations period. See id. Once a plaintiff realizes that she has been the victim of actionable harassment, however, she must sue; she cannot wait, even though the harassment may be

continuing. See Galloway v. Gen. Motors Serv. Parts Operations, 78 F.3d 1164, 1167 (7th Cir. 1996) (a plaintiff may not base her suit "on conduct that occurred outside of the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct . . . .").

The court finds that plaintiff [*12] has alleged a continuing violation such that her harassment claim may be based on the incidents that took place before August 14, 1993. Plaintiff has alleged similar acts of harassment by the same individual over a period of time. Additionally, Mabry's conduct before August 14, 1993, was not severe or pervasive enough to constitute actionable harassment. As the Seventh Circuit recognized in Galloway:

> Sexual harassment serious enough to constitute unlawful discrimination on grounds of sex is often a cumulative process rather than a one-time event. In its early stages it may not be diagnosable as sex discrimination, or may not cross the threshold that separates the nonactionable from the actionable, or may not cause sufficient distress to be worth making a federal case out of . . . .

Id. at 1166 (citations omitted). Accordingly, plaintiff was not yet required to file an EEOC charge. The court, however, need not reach the issue of the timeliness of plaintiff's EEOC charge. Even if plaintiff were allowed to base her harassment claim on all of the alleged incidents, and the court were to assume that all of those incidents took place and that plaintiff reported them to her supervisors in detail, the Bank would still not be liable.

"When an employee is harassed by a co-worker, [as opposed to a supervisor,] the employer may be held

responsible only if 'the employer knew or should have known about [the] employee's acts of harassment and failed to take appropriate remedial action.'" McKenzie v. Illinois Dep't of Transp., 92 F.3d 473, 480 (7th Cir. 1996) (quoting Brooms v. Regal Tube Co., 881 F.2d 412, 421 (7th Cir. 1989)). In this case, plaintiff admits that she did not tell any of her supervisors about Mabry's conduct until March 28, 1994. Mabry's conduct was not so pervasive such that the Bank should have known about it before plaintiff complained. It is undisputed that once plaintiff complained, Mabry was instructed to avoid any contact with her that was not work-related, not to speak to her unless required by his job responsibilities, and to limit the amount of time he spent at work. He was warned in writing about questionable behavior in the future, and required to receive special coaching concerning his non-verbal demeanor. Plaintiff was allowed to take two weeks vacation with pay, and told that she could transfer to another position [*14] if she desired. Ultimately, Mabry was required to have a member of management escort him whenever he ever needed to conduct business with plaintiff in person. Moreover, the Bank took of all of these remedial steps even though it found no corroborating evidence of harassment and Mabry denied all of plaintiff's allegations.

"'An employer's response to alleged instances of employee harassment must be reasonably calculated to prevent further harassment under the particular facts and circumstances of the case at the time the allegations are made.'" McKenzie, 92 F.3d at 480 (quoting Brooms, 881 F.2d at 421). In this case, the Bank's response was reasonably calculated to prevent further harassment. In

fact, although courts are not supposed to focus solely on whether a defendant's remedial steps ultimately succeed, see McKenzie, 92 F.3d at 480 (quoting Brooms, 881 F.2d at 421), the court notes that the Bank's response appears to have worked. Mabry did not make any sexual comments to plaintiff or touch her again after she complained in March 1994. Although plaintiff asserts that Mabry continued to stare at her in an intimidating manner, that alone does not constitute harassment. [*15] Steps more drastic than those taken by the Bank were simply not required under the circumstances. See Saxton v. Am. Tel. and Tel. Co., 10 F.3d 526, 535-36 (7th Cir. 1993) (rejecting plaintiff's sexual harassment claim because she failed to produce evidence of a significant shortcoming in the defendant's response to her complaints and finding "whatever reasons there might be for the company's failure to take additional steps . . . are irrelevant absent evidence suggesting that [the action the company did take] was not reasonably likely to prevent the harassment from recurring"). "If an employer takes reasonable steps to discover and rectify the harassment of its employees . . . it has discharged its legal duty." McKenzie, 92 F.3d at 480. The Bank discharged its legal duty in this case. Accordingly, the Bank's motion for summary judgment is granted as to Count I.

III. RETALIATION

To establish a prima facie case of retaliation under Title VII, plaintiff must present evidence that: "(1) she engaged in statutorily protected expression; (2) she suffered an adverse action by her employer; and (3) there is a causal link between the protected expression and the

adverse [*16] action." Dey v. Colt Const. & Dev. Co., 28 F.3d 1446, 1457 (7th Cir. 1994). Plaintiff has established the first and second elements of a prima facie case of retaliation: she engaged in statutorily protected expression when she complained in March 1994, and suffered an adverse employment action when she was fired by the Bank on August 28, 1995.[3] Plaintiff, however, has failed

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[3] Plaintiff also asserts that the Bank retaliated against her by closing the its investigation into her complaints. This assertion is nonsensical. The Bank conducted an investigation because she complained. As a result, the Bank took various remedial actions for plaintiff's benefit, and then closed the investigation. Plaintiff also complains that the Bank retaliated against her by moving her desk to a remote cubicle in order to isolate her from her co-workers. This move, however, took place in late 1994, months after plaintiff first complained. In addition, Mazer has testified that she and Neff reorganized the Graphics Services work area in order to place the members of each work team closer together. In fact, Mazer has testified that plaintiff's space was chosen so that she would be near her team, but would not be near any employees who had regular contact with Mabry. Plaintiff has presented only speculation, not evidence, to rebut this testimony. Finally, in her response brief, plaintiff asserts that she was also subject to the following adverse employment actions: demotion, transfer, negative evaluation, and verbal misconduct. Plaintiff was not demoted or transferred. Although plaintiff did receive some negative evaluations (well after she first complained), they cannot, standing alone, constitute an adverse employment action under Title VII. See Sweeney v. West, 149 F.3d 550, 1998 U.S. App. LEXIS 14487, 1998 WL 344268, at *6 (7th Cir. 1998); Smart v. Ball State Univ., 89 F.3d 437, 442 (7th Cir. 1996). As for verbal misconduct, plaintiff has failed to describe any verbal abuse by her supervisors in her brief. Nor has she directed the court to any description of such abuse that might appear in the record. In any event, harsh words from her supervisors regarding subjects other than the fact that she complained would probably not

(continued...)

to present evidence of a causal link between these two events. Plaintiff claims that an inference of retaliation may be drawn from the timing of her complaints and termination, but there is nothing suspicious about the timing of these events. On the contrary, the fact that she was terminated almost a year and a half after her first complaint suggests that her termination had nothing to do with her complaints. See Hughes v. Derwinski, 967 F.2d 1168, 1174 (7th Cir. 1992) (four-month gap between discrimination claim and disciplinary action too large to create an inference of retaliation).

Even if plaintiff could establish a prima facie case of retaliation, her claim would still fail. The Bank has presented evidence that plaintiff was fired for poor performance sufficient to shift the burden to plaintiff to establish that the Bank's proffered reason for her termination is a mere pretext. See Dey v. Colt Const. & Dev. Co., 28 F.3d 1446, 1457 (7th Cir. 1994) (the McDonnell Douglas burden-shifting method of proof applies to retaliation claims). In response, plaintiff simply claims that her performance was adequate. She claims that she received average performance evaluations during her ten-

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[3] (...continued)
amount to adverse employment action. See Sweeney, 1998 WL at *5 ("[a] dirty look or the silent treatment . . . is [not] enough to prompt a federal case"); Smart, 89 F.3d at 441 ("not everything that makes an employee unhappy is an actionable adverse action"); Flaherty v. Gas Research Inst., 31 F.3d 451, 457 (7th Cir. 1994) (a lateral transfer, where employee's title would be changed and employee would report to a former subordinate, may have caused a "bruised ego" but did not constitute an adverse employment action).

ure at the Bank, but suddenly started receiving negative evaluations in June 1995. Plaintiff's past performance is not relevant. In any event, plaintiff's self-interested assertions concerning the quality of her job performance cannot overcome defendant's evidence that she was fired for poor performance and raise a genuine issue of fact as to pretext. See Williams v. Williams Elec., Inc., 856 F.2d 920, 924 (7th Cir. 1988); Dale v. Chicago Tribune Co., 797 F.2d 458, 464-65 (7th Cir. 1986).

The only issue at this stage of a summary judgment analysis is whether the Bank [*18] honestly believed that plaintiff's performance was deficient, not whether the Bank was mistaken in that belief. See Russell v. Acme-Evans Co., 51 F.3d 64, 69 (7th Cir. 1995) ("the issue [is] not the adequacy in fact of [a plaintiff's] performance. It [is] the honesty of the company's belief that it was inadequate, and as to this [plaintiff] has no basis for testifying"); Kralman v. Illinois Dep't of Veterans' Affairs, 23 F.3d 150, 156 (7th Cir. 1994) ("there is a fine line between evidence that appropriately challenges the employer's proffered reasons as being unworthy of credence and evidence that merely shows that the employer made a mistake or a bad business judgment"). Plaintiff has presented no other evidence that either rebuts the Bank's assertion that it fired her for poor performance or suggests that there is a causal link between her acts of protected expression and her termination.

Accordingly, the Bank's motion for summary judgment is granted as to Count II.

IV. MOTION TO STRIKE

In addition to her own affidavit, plaintiff has submitted the affidavits of her son, Alonzo G. Caudillo, her sister, Maria O. Collins, and her friend, Nora R. La Porta. [*19] The relevant statements contained in the affidavits of Mr. Caudillo and Ms. Collins are either hearsay or have been made without personal knowledge. The evidence of plaintiff's character presented in the affidavit of Ms. La Porta is not relevant to the Bank's liability. In any event, none of the statements in any of the affidavits give rise to a disputed issue of material fact that would preclude summary judgment. Accordingly, the Bank's motion to strike the affidavits is granted.

CONCLUSION

The Bank's motion for summary judgment is granted as to all counts. The Bank's motion to strike the affidavits of Alonzo G. Caudillo, Maria O. Collins, and Nora R. La Porta is granted. Judgment is entered for the Bank on all counts.

ENTER: July 15, 1998

Robert W. Gettleman
United States District Judge

B-16

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that defendant's motion for summary judgment is granted as to all counts. Defendant's motion to strike affidavits is granted.

Date: 7/15/1998

APPENDIX C

2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer–

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.